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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
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11 ALICIA MADRIGAL BARRAZA,

12 Plaintiff,

13 v.

14 FRANK BISIGNANO,  
15 Commissioner of Social Security,<sup>1</sup>

16 Defendant.  
17

Case No. 1:21-cv-0790 JLT BAM

ORDER ADOPTING THE FINDINGS AND  
RECOMMENDATIONS; DENYING  
PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT; GRANTING DEFENDANT'S  
REQUEST TO AFFIRM; AND DIRECTING  
ENTRY OF JUDGMENT IN FAVOR OF  
DEFENDANT FRANK BIGSIGNANO,  
COMMISSIONER OF SOCIAL SECURITY,  
AND AGAINST PLAINTIFF ALICIA  
MADRIGAL BARRAZA  
(Docs. 20, 24, 26)

18 Alicia Madrigal Barraza initiated this action seeking judicial review of a final decision  
19 denying her applications for disability insurance benefits and supplemental security income under  
20 Titles II and XVI of the Social Security Act. (*See* Docs. 1, 20.) Plaintiff contends that the ALJ  
21 erred by: (1) finding at step two that her hiatal hernia and bilateral foot pain were not severe  
22 impairments and (2) not developing the record related to her depression. (Doc. 20 at 9-14.)

23 The assigned magistrate judge found that "any purported error in failing to include  
24 Plaintiff's hernia or bilateral foot pain as severe impairments at step two is harmless because the  
25 ALJ considered those impairments and any resulting limitations at subsequent steps of the  
26 sequential evaluation." (Doc. 26 at 5-6.) The magistrate judge determined that because the ALJ  
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28 <sup>1</sup> Frank Bisginano became the Commissioner of Social Security on May 7, 2025. Pursuant to Rule 25(d) of the  
Federal Rules of Civil Procedure, the Court substitutes Frank Bisignano as the defendant in this action.

1 considered the identified impairments— “and any impact those impairments would have when  
2 determining an appropriate RFC”— Plaintiff did not identify any error warranting remand. (*Id.*,  
3 citing *Kessler v. O’Malley*, 2024 WL 1908078, at \*5 (E.D. Cal. May 1, 2024); *Teague v. Astrue*,  
4 2010 WL 5094252, at \*5 (C.D. Cal. Dec. 7, 2010).) Next, the magistrate judge found that to the  
5 extent Plaintiff challenges the record as incomplete, the “issue is not properly preserved for  
6 appeal” because at the hearing, Plaintiff was represented by counsel, who indicated the record  
7 was complete. (*Id.* at 8.) The magistrate judge determined that even if Plaintiff did not waive the  
8 issue, there was “no indication that the record was ambiguous or inadequate to allow for proper  
9 evaluation” of Plaintiff’s mental impairments, as required to trigger the duty to develop the  
10 record. (*Id.* at 10.) The magistrate judge observed the record included, and the ALJ considered,  
11 an opinion from Plaintiff’s treating physician concerning Plaintiff’s mental impairments and  
12 treatment notes that “addressed ... Plaintiff’s complaints of depression.” (*Id.*) Thus, the  
13 magistrate judge recommended the Court deny Plaintiff’s motion for summary judgment, affirm  
14 the administrative decision, and enter judgment in favor of the Commissioner. (*Id.* at 11.)

15 Plaintiff filed objections to the Findings and Recommendations, asserting the Court  
16 should reject the findings of the magistrate judge. (Doc. 27.) Plaintiff contends the magistrate  
17 judge “did not provide[] any rationale to support the conclusion that the medical evidence does  
18 not ‘clearly establish’ Plaintiff’s bilateral plantar fasciitis and heel spurs to be non-severe.” (*Id.* at  
19 2.) Plaintiff acknowledges the ALJ cited evidence concerning her plantar fasciitis and heel spurs,  
20 but maintains the ALJ did not address limitations caused by her combined impairments. (*Id.* at 3;  
21 *see also id.* at 3-6.) Plaintiff also argues that “whether the issue was ‘complete’ is not the issue,”  
22 and instead the issue is that the record was “inadequate to allow for proper evaluation of the  
23 evidence.” (*Id.* at 6.) Plaintiff contends that counsel “affirming that all existing medical evidence  
24 has been submitted, does not mean that the record is ‘adequate to allow for proper evaluation of  
25 the evidence.’” (*Id.*) According to Plaintiff, “she presented evidence of disabling [mental]  
26 impairment” and the ALJ had “the duty to develop the record to assure that there is sufficient  
27 evidence to evaluate the impairments.” (*Id.* at 7.) Plaintiff maintains there is a gap in the record  
28 concerning her mental impairments, similar to a gap “contemplated by the same case cited by the

1 Magistrate.” (*Id.* at 8, citing *Gonzalez v. Kijakazi*, No. 1:21-CV-01676-SKO, 2023 WL 6164086,  
2 at \*6 (E.D. Cal. Sept. 21, 2023).) Plaintiff contends that because there was not a consultative  
3 examination concerning her mental impairments, remand is warranted for such to be obtained.  
4 (*Id.* at 8-9.) The Commissioner filed a response to the objections, asserting the Court should  
5 adopt the recommendations. (Doc. 28.)

6 As an initial matter, as the magistrate judge observed, the Ninth Circuit determined that  
7 “when claimants are represented by counsel, they must raise all issues and evidence at their  
8 administrative hearings in order to preserve them on appeal.” *Meanel v. Apfel*, 172 F.3d 1111,  
9 1115 (9th Cir. 1999). Toward this end, because it is undisputed that Plaintiff did not raise the  
10 need of a consultative mental examination, such an argument was waived. *See, e.g., Shaibi v.*  
11 *Berryhill*, 883 F.3d 1102, 1109 (9th Cir. 2018) (finding failure by counsel to raise an issue in the  
12 administrative proceedings results in “the claimant forfeit[ing] such a challenge on appeal”); *King*  
13 *v. Comm’r of Soc. Sec.*, 2024 WL 1257331, at \*7 (E.D. Cal. Mar. 25, 2024) (finding a plaintiff  
14 waived the argument that a consultative examination was required where counsel “fail[ed] to raise  
15 the issue before the ALJ or the Appeals Council”); *Brandon G.M. v. Kijakazi*, 2022 U.S. Dist.  
16 LEXIS 95848, at \*10 (C.D. Cal. May 26, 2022) (holding a claimant waived an argument that the  
17 ALJ was required to order a consultative examination “by failing to request a consultative  
18 examination during the administrative proceedings”); *Hahn v. Berryhill*, 2017 WL 2927151, at \*4  
19 (D. Or. June 30, 2017) (“Plaintiff, by not raising the issue before the ALJ, waived any challenge  
20 to the ALJ’s failure to develop the record further by ordering a comprehensive physical  
21 examination.”) Consequently, Plaintiff is now unable to claim the ALJ had a duty to develop the  
22 record or obtain a consultative examination concerning her mental impairments.

23 Moreover, even in *Gonzalez*, which Plaintiff suggests in her objections “contemplated” a  
24 similar gap in the record, this Court found that Plaintiff failed to show the ALJ had a duty to  
25 develop the record. *See Gonzalez*, 2023 WL 6164086, at \*6. The Court explained that “[t]he  
26 record contained [Gonzalez’s] complete treatment records, as counsel conceded at the hearing [],  
27 and no ‘gaps’ or inconsistencies were noted.” *Id.* (citation omitted). The magistrate judge found  
28 *Gonzalez* did not show the ALJ had a duty to develop the record. *Id.* Similarly, here, Plaintiff

1 does not show that the raised the issue of needing a mental consultative examination before the  
2 ALJ, and Plaintiff fails to show the record was inadequate or ambiguous.

3 Plaintiff also fails to show the ALJ committed harmful error at step two. The inquiry at  
4 step two is a *de minimus* screening “to dispose of groundless claims.” *Smolen v. Chater*, 80 F.3d  
5 1273, 1290 (9th Cir. 1996). However, any error from finding specific impairments are not severe  
6 may be harmless when step two is resolved in the claimant’s favor. *Burch v. Barnhart*, 400 F.3d  
7 676, 682 (9th Cir. 2005). Although Plaintiff contends the magistrate judge erred by not  
8 addressing the lack of evidence to support the determination that Plaintiff’s hiatal hernia and  
9 bilateral foot impairments were not severe, the magistrate judge determined that *even assuming*  
10 the ALJ erred at step two with this finding, such error was harmless. (*See* Doc. 26 at 5-7.) As the  
11 magistrate judge found, because the ALJ considered evidence concerning these impairments and  
12 their resulting limitations to determine the residual functional capacity—including medical  
13 opinions, treatment records, and Plaintiff’s own testimony concerning her pain—Plaintiff fails to  
14 show prejudice and any such error was harmless. *See Burch*, 400 F.3d at 682; *Buck v. Berryhill*,  
15 869 F.3d 1040, 1049 (9th Cir. 2017) (finding where the ALJ resolved step two in the claimant’s  
16 favor and constituted with the sequential analysis, the claimant “could not possibly have been  
17 prejudiced” and “[a]ny alleged error is therefore harmless and cannot be the basis for a remand”);  
18 *see also Kessler v. O’Malley*, 2024 WL 1908078, at \*4-5 (E.D. Cal. May 1, 2024) (finding any  
19 error by the ALJ at step two was harmless because the ALJ considered the claimant’s testimony  
20 and medical records related to his identified impairment).

21 According to 28 U.S.C. § 636(b)(1), this Court conducted a *de novo* review of the case.  
22 Having carefully reviewed the entire matter—including Plaintiff’s objections and the  
23 Commissioner’s response thereto—the Court concludes the Findings and Recommendations are  
24 supported by the record and proper analysis. Thus, the Court **ORDERS**:

- 25 1. The Findings and Recommendations (Doc. 26) are **ADOPTED**.
- 26 2. Plaintiff’s motion for summary judgment (Doc. 20) is **DENIED**.
- 27 3. Defendant’s request to affirm the administrative decision (Doc. 24) is **GRANTED**.
- 28 4. The Clerk of Court is directed to enter judgment in favor of Defendant Frank

1 Bisginano, Commissioner of Social Security, and against Plaintiff Alicia Madrigal  
2 Barraza, and to close this case.

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4 IT IS SO ORDERED.

5 Dated: **June 12, 2025**

  
UNITED STATES DISTRICT JUDGE